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10 UNITED STATES DISTRICT COURT
 11 CENTRAL DISTRICT OF CALIFORNIA

12 NAM NGUYEN,

13 Plaintiff,

14 vs.

15 BDO SEIDMAN, LLP, a Limited
 16 Liability Partnership; and DOES 1-
 17 10, inclusive,

18 Defendants.

19 Case No.: SACV07-1352 JVS MLGx

20 **PLAINTIFF’S NOTICE OF MOTION
 21 AND MOTION FOR REVIEW OF
 22 MAGISTRATE JUDGE’S ORDER
 23 OF NOVEMBER 18, 2008**

24 Date: December 22, 2008
 25 Time: 1:30 p.m.
 26 Courtroom No.: 10C
 27 Hon. James V. Selna, United States
 28 District Judge

Discovery Cutoff: 8/4/09
 Pre-Trial Conference: 11/2/09
 Trial Date: 11/17/09

1 **NOTICE OF MOTION**

2 TO: DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

3 NOTICE IS HEREBY GIVEN that on December 22, 2008 at 1:30 p.m.,
4 before Hon. James V. Selna in Courtroom No. 10C of the above entitled Court,
5 pursuant to Federal Rule of Civil Procedure 72(a), plaintiff NAM NGUYEN will
6 move the Court for Review of Magistrate Judge Marc L. Goldman's November 18,
7 2008 Order Granting in Part and Denying in Part Plaintiff's Motion to Compel
8 Production of Documents and issue a new order allowing plaintiff to conduct
9 discovery concerning the entire class.

10 This motion is based on the accompanying Memorandum of Points and
11 Authorities and on such evidence as may be presented at the hearing on this motion.

12
13 Respectfully submitted,

14 Dated: December 1, 2008. KERSHAW, CUTTER & RATINOFF LLP

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4 This is a class action lawsuit brought on behalf of Tax and Attest Associates
5 employed by the defendant who have not yet obtained their CPA license. The
6 complaint alleges that these associates are misclassified as “exempt employees”
7 under California law and are, therefore, improperly denied overtime and other
8 employment benefits.

9 The plaintiff in this case worked as an associate for the defendant for
10 approximately two years. During this time, he was employed as both a Tax and
11 Attest Associate. In his Motion to Compel, plaintiff sought two categories of
12 documents from the defendants relating to both Tax and Attest Associates.
13 Specifically, plaintiff sought various employment policies and procedures for these
14 employees as well as their contact information.

15 On November 18, 2008, Magistrate Judge Marc L. Goldman issued an Order
16 Granting in Part and Denying in Part Plaintiff’s Motion to Compel Production of
17 Documents. A true and correct copy of Magistrate Goldman’s Order is attached
18 hereto as Exhibit 1. Magistrate Goldman ruled that plaintiff could obtain
19 documents sought in the requests but that the defendant would not be required to
20 produce any documents relating to Attest Associates. Although Magistrate
21 Goldman acknowledged that the named plaintiff actually worked as an Attest
22 Associate during his employment with defendant, he concluded that this was not
23 sufficient for him to obtain any discovery concerning these employees. Effectively
24 deciding class certification during the discovery phase of this case, Magistrate
25 Goldman concluded that plaintiff could not obtain the requested discovery because
26 “Plaintiff has not demonstrated that he represents any putative plaintiffs other than
27 Tax associates.”

28 As explained more fully below, plaintiff believes that Magistrate Goldman’s

1 ruling was in error. Contrary to the Magistrate’s Order, plaintiff’s complaint does
2 seek to represent both Tax and Attest Associates. In order for the class
3 representative to show that his claims are typical of these associates, he is entitled
4 to discovery concerning the entire class. As such, plaintiff respectfully requests
5 that the Court review Magistrate Goldman’s Order and issue a new order allowing
6 plaintiff to conduct discovery concerning the entire class.

7 **II.**

8 **FACTS**

9 The named plaintiff worked for the defendant as an Associate for
10 approximately two years. During this entire time period he was classified as an
11 exempt employee and did not receive payment for overtime.

12 The defendant has two divisions; a Tax Division and an Attest Division. The
13 Tax Division primarily helps individuals and businesses prepare tax returns. The
14 Attest Division conducts audits of the defendant’s clients to ensure that their
15 financial statements are accurate.

16 During his two years of employment with the defendant, the named plaintiff
17 primarily worked as an associate in the defendant’s Tax Division. However, he did
18 spend approximately 2 to 3 weeks performing audits in the defendant’s Attest
19 Division. During this time period, he spent his entire day working directly
20 alongside other Attest Associates and was not paid overtime.

21 In this case, plaintiff asserts that the defendant improperly classified both its
22 Attest and Tax Associates as exempt. Specifically, the plaintiff alleges that in order
23 for individuals employed in the field of accountancy to be properly classified as
24 exempt, those employees must be licensed by the state of California. Additionally,
25 plaintiff contends that unlicensed associates in both the Attest and Tax Divisions
26 cannot “customarily and regularly exercise independent judgment and discretion
27 with respect to matters of significance.” One of the reasons they cannot exercise
28 such discretion is because California’s Business and Professions Code specifically

1 requires non-licensed individuals practicing accountancy to be “supervised and
2 controlled” by a CPA.

3 Plaintiff’s complaint alleges that with respect to both Attest and Tax
4 Associates, common issue of law and fact predominate over any individual issues.
5 Plaintiff also alleges that his claims are typical of the Class as a whole.

6 In order to establish commonality and typicality, plaintiff sought discovery
7 concerning the duties and responsibilities of both Tax and Attest Associates.
8 Specifically, on May 6, 2008, plaintiff served Plaintiff’s First Set of Requests for
9 Production of Documents (hereinafter “RFPs”). *See* Talley Decl., Ex. 1.¹ At issue
10 in the Motion to compel are RFP Nos. 17 and 23. RFP No. 17 seeks BDO’s
11 policies and procedures for determining which of the putative class members are
12 exempt from receiving overtime. RFP No. 23 seeks documents identifying the
13 class members that plaintiff seeks to represent in this case. BDO refused to provide
14 any documents responsive to these requests and plaintiff filed a motion to compel.

15 On November 18, 2008, Magistrate Judge Goldman issued an Order Granting
16 in Part and Denying in Part Plaintiff’s Motion to Compel Production of Documents.
17 The Magistrate ordered defendant to produce documents reflecting BDO’s policies
18 and procedures for determining exemption, but only as to Tax Associates, and not
19 as to Attest Associates. The only rationale for imposing this limitation was
20 “because Plaintiff was never employed as an Attest associate, but simply worked in
21 that department for several weeks as part of a certification requirement.”

22 With respect to RFP No. 23, the Magistrate again denied discovery for Attest
23 Associates. In this part of his order, Magistrate Goldman noted that the rationale
24 for his decision was that “Plaintiff has not demonstrated that he represents any
25 putative plaintiffs other than Tax associates.”

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27 _____
28 ¹ All references to “Talley Decl.” refer to the Declaration of Stuart Talley in Support of Plaintiff’s
Motion to Compel filed with Plaintiff’s Notice of Motion and Motion to Compel on October 14,
2008.

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III.

STANDARD OF REVIEW

A District Court may reconsider pretrial orders of a magistrate judge “where it has been shown that the magistrate judge’s order is clearly erroneous or contrary to law.” 28 U.S.C. § 636(b)(1)(A).

IV.

LEGAL ARGUMENT

A. The Magistrate Erred by Concluding That Plaintiff Does Not Represent Attest Associates.

In his Order the Magistrate concluded that that “Plaintiff has not demonstrated that he represents any putative plaintiffs other than Tax associates.” The Magistrate’s reasoning is clearly erroneous since, at this stage of the proceedings, plaintiff is not required to “demonstrate that he represents” Attest Associates.

Rather, plaintiff is seeking discovery to demonstrate that he *can* adequately represent the claims of Attest Associates. To do this, the plaintiff must show that there are common issues of law and fact and that his claims are typical of the class. By denying discovery concerning half of the putative class, the Magistrate has essentially issued a preemptive ruling denying class certification with respect to Attest Associates. Such a ruling is simply erroneous at this stage of the proceedings and effectively supersedes the Magistrate’s authority. *See* 28 U.S.C. § 636(b)(1)(A) (prohibiting magistrate judges from determining, among other things, class certification issues).

Moreover, the Magistrate’s ruling appears to disregard controlling case law that expressly rejected the reasoning embraced by the Magistrate on this issue. The court in *Putnam* dealt with and disposed of precisely the same argument made by the defendant in this case:

1 “Defendant objects to providing the requested
2 information, arguing that the overwhelming majority of
3 the subject employees worked outside of plaintiff’s sales
4 division and in different positions than plaintiff, and that
5 the information being sought by plaintiff is irrelevant and
6 unnecessary at this stage of the litigation. ...

7 Defendant offers no adequate explanation as to why
8 information about pharmaceutical representatives in sales
9 divisions other than the one in which plaintiff worked is
10 not relevant to the inquiry. Instead, it seems to the Court
11 that contact with those individuals could well be useful
12 for plaintiff to determine, at a minimum, the commonality
13 and typicality prongs of Rule 23.” *Putnam v. Eli Lilly &*
14 *Co.* (C.D. Cal. 2007) 508 F. Supp. 2d at 813-14.

15 Just as in *Putnam*, plaintiff here has alleged a number of factual and legal
16 questions common to the entire class, across divisions and job titles. Also as in
17 *Putnam*, contact with those individuals will likely provide evidence useful to
18 support commonality, typicality, and other certification issues. Because *Putnam*
19 deals with the precise legal issue upon which the Magistrate apparently based his
20 partial denial of plaintiff’s motion, in factual circumstances similar to those in the
21 present case, the holding in *Putnam* makes the Magistrate’s decision clear legal
22 error.

23 **B. The Authority Relied Upon by the Magistrate Judge is Inapplicable
24 Because it is a Class Certification Decision and Has Nothing to Do with
25 Pre-Certification Discovery**

26 The Magistrate’s Order fails to cite to or discuss *Putnam*, which is a decision
27 on a pre-certification discovery dispute nearly identical to that in the present case.
28 The magistrate instead cites to a decision on *class certification*, which had nothing
whatsoever to do with a pre-certification discovery dispute. *See* Order at p. 3,
citing *Campbell v. PricewaterhouseCoopers*, 2008 WL 818617, *8 (E.D. Cal.
March 25, 2008).

Campbell is a class action that was brought by two Attest Associates against
an accounting firm. The plaintiffs sought to certify a class consisting of both Tax
and Attest Associates. In ruling on class certification, the judge certified the Attest
Associates but did not include the Tax Associates in the class. One of the rationales

1 for not certifying the Tax Associates was that, *after considering the evidence*, the
2 court determined that the plaintiff's claims were not typical of the class since they
3 were never employed as Tax Associates. *Campbell v. PricewaterhouseCoopers*,
4 253 F.R.D. 586, 596 (E.D. Cal. 2008).

5 Thus, the *class certification* decision in *Campbell* was based on evidence
6 obtained in discovery and presented to the court. The only evidence before the
7 Magistrate on plaintiff's Motion to Compel in the present case was deposition
8 testimony demonstrating that the named plaintiff *had* worked in the Attest line of
9 service for a brief period of time. Nevertheless, the Magistrate's Order effectively
10 forecloses plaintiff from obtaining discovery regarding Attest Associates employed
11 by the defendant. The portion of the Magistrate's Order denying plaintiff contact
12 information and other discovery related to Attest Associates is clear legal error and
13 an abuse of discretion. That portion of the Magistrate's Order should be reversed,
14 and defendant should be Ordered to produce the documents sought with respect to
15 the entire putative class.

16 IV.

17 CONCLUSION

18 The Magistrate Judge's Order recognizes that case law and basic
19 Constitutional rights support granting plaintiff's Motion to Compel. *See* Order at
20 p. 2 ("Due process requires an opportunity to conduct discovery on class action
21 issues prior to class certification proceedings."). Nevertheless, the Magistrate
22 denies that very Constitutional right by denying discovery with respect to half of
23 the putative class. The Magistrate does so by making a preemptive class
24 certification determination that "Plaintiff has not demonstrated that he represents
25 any putative plaintiffs other than Tax associates." *Id.* at p. 3. Such a determination
26 exceeds the express statutory limitations on the magistrate's authority and is
27 contrary to the applicable case law.
28

1 As such, plaintiff asks the Court to reverse the portions of the Order
2 Denying in Part Plaintiff's Motion to Compel and further to order defendant to
3 timely produce the documents sought in RFP Nos. 17 and 23 with respect to the
4 *entire* putative class.

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6 Dated: December 1, 2008. KERSHAW, CUTTER & RATINOFF LLP

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